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missive" licensee is unfortunate, as implying a real license, whereas a more accurate analysis of the situation is that the frequency of user, known to the railroad's agents, creates such a danger to the public that the burden of care thrown upon the railroad is similar to that at an authorized crossing.

W. E. M., JR.

CAPACITY TO CONTRACT IN PRIVATE INTERNATIONAL LAW.—It is the purpose of this note to consider the capacity of parties to make contracts in regard to movables where there is a conflict of laws raised as to which is the proper law to determine this capacity. This problem arises whenever the contract is of such a nature that the law of more than one jurisdiction may possibly be involved. The authorities indicate that there are five possible solutions of the problem according to present private international law rules, of which four only have been adopted in the United States with a marked tendency to reduce this number to three. These five solutions are the *lex patriae*, the *lex domicilii*, the *lex celebratonis* (usually termed the *lex loci contractus*), the *lex solutionis*, and the law contemplated by the parties as the proper law to govern. This last solution is usually termed the "Intention of the Parties Rule." Each of these solutions is in general ardently supported by the jurisdiction adopting it by reason of peculiar local conditions or nationalistic characteristics. For example, the *lex patriae* rule is, in general, in force in continental countries<sup>1</sup> where nationalistic sentiment is strong and where public thought is opposed to the casting off of the rights and duties of citizenship by a mere change of residence no matter how permanent in character. This rule is, however, obviously impractical in federated states such as Great Britain, Germany and the United States. In England the *lex domicilii* rule appears to have been the test of capacity to contract,<sup>2</sup> with the exception possibly of commercial contracts.<sup>3</sup> Whether this statement is strictly accurate today is doubtful, as the modern tendency of English decisions is to treat all matters relating to contracts as governed by the law that the parties had in contemplation in making the contract.<sup>4</sup> No case has been found where this doctrine was specifically applied to a question of capacity except one,<sup>5</sup> where a party suffering under

<sup>1</sup>Asser; *Droit International Privé*, 56; Baty: *Polarized Law*, 30.

<sup>2</sup>Dicey: *Conflict of Laws*, 2nd Ed. 534, 538; LaFleur: *Conflict of Laws in the Province of Quebec*, 67; *Cooper v. Cooper*, 13 App. Cases 88 (Eng. 1888).

<sup>3</sup>*Male v. Roberts*, 3 Esp. 163 (Eng. 1800); *Sottomayor v. DeBarros*, 5 P. D. 94 (Eng. 1879).

<sup>4</sup>*Hamlyn v. Talisker Distillery Co.*, (1894) A. C. 202; *South African Breweries Co. v. King*, 2 Ch. 173 (Eng. 1899).

"The intention as to which law should govern is to be found by preferring the law of the place with which the transaction has the most real connection."

"The fact that the contract may be partially or wholly invalid under one of the laws that might possibly apply is relevant in finding the intention but not conclusive."

<sup>5</sup>*Ogden v. Ogden* (1908) P. 46.

an incapacity to marry by the law of his domicile, France, was nevertheless deemed validly married after a marriage ceremony in England in full compliance with the English marriage laws. From the language of the court in this case it is difficult to discover whether the decision is based on the intent of the parties' doctrine flatly or on a concept of the French law that the incapacity stated amounted merely to a formality rather than a true incapacity to contract. If this tendency of the English courts develops so that the Intent Rule applies to the capacity to contract, as is thought by several modern English authorities, it seems justly subject to the criticism of Westlake<sup>6</sup> that it may be precisely the lawfulness of the parties' intention which is in dispute and that this question should not be solved by reference to the intention itself.

The *lex loci contractus*, the *lex solutionis*, and the Intention of the Parties rules are all supported in the United States with a decided tendency to favor the last,<sup>7</sup> though a few technicians object vehemently to its application to any case where the legality of the parties' intention is in issue.<sup>8</sup> The argument advanced against the Intention Rule seems to be that the intention of the parties is used to select some local law; that the local law, thus selected, is then applied to determine the capacity of the parties to form a legally efficacious intent, and that therefore such a rule uses the intention to select a law by which to decide the legal existence of this very intention. In short the opponents of the Intention Rule accuse the proponents thereof of reasoning in a circle. The argument of the proponents in answer appears to be that it is possible to form a conclusion as to the general wishes of the parties without regard to the possible partial or complete illegality thereof and then to test the specific legality of the contract in controversy by the law thus selected. One English text writer states that the English courts, in adopting the Intention Rule, merely arrive at the result of always applying English law.<sup>9</sup> He further indicates that the cases show a strong tendency to find that the parties always desire to do honor to the law of England by selecting it as the law of their choice.<sup>10</sup> This destructive criticism, of course, only goes to the faulty application of the rule and not to the merits of the rule itself except to indicate that it is possessed of inherent dangers that are apt to effectuate prejudice in its application. This author appears to condemn the English

<sup>6</sup>Private International Law, Sect. 211.

<sup>7</sup>Pritchard v. Norton 106 U. S. 124 (1882); Mayer v. Roche 77 N. J. L. 681, 75 Atl. 235 (1909); Basilea v. Spagnuolo, 80 N. J. L. 88, 77 Atl. 531 (1910); Fisk Rubber Co. v. Muller, 42 App. D. C. 49 (1914); Poole v. Perkins, 101 S. E. 240 (Va. 1919).

<sup>8</sup>Baty: Polarized Law, 43; Raleigh C. Minor, "Conflict of Laws," Sect. 72; note 26 L. R. A. (N. S.) 763; note 1916A L. R. A. 1056; Campbell v. Crampton, 2 Fed. 417 (1880); Burr v. Beckler, 264 Ill. 230, 106 N. E. 206 (1914).

<sup>9</sup>Baty: Polarized Law, 46.

<sup>10</sup>Hansen v. Dixon, 23 T. L. R. 56 (Eng. 1906).

courts not only for their faulty application of the Intention Rule but also for the adoption of the rule itself, as he claims that the policy of giving complete freedom to the intention of the parties in contractual questions is wholly a creature of the English law, and that therefore the courts of England are in effect merely applying English law instead of international law to a truly international law problem. It would seem that this argument is at fault in not appreciating the difference between a declaration of what the local law of a country is and a declaration of the local interpretation of the true international law rule. The argument assumes that, because none of the courts that have applied international law in the past have expressed the rule in this form, it cannot be a true rule of international law, whereas it may in fact be the logical product of the growth and development of this law in the course of time with a due regard for the changing international conditions.

While the rule of applying the intention of the parties is declared to be the tendency in the United States by several recent opinions, the existing weight of authority is hopelessly divided between the application of the *lex loci contractus* and the *lex solutionis* with perhaps a predominance in favor of the former. This difference appears to have arisen by reason of an inaccurate comprehension of the decision in the leading American case of *Milliken v. Pratt*.<sup>11</sup> In this case the language of the court indicated in one passage that the *lex loci contractus* governed and later placed emphasis on the *lex solutionis*, both laws being the same under the facts of the case. The authorities have, however, found it to have been decided on one basis or the other depending, in all probability, upon previously formed conclusions as to what the true rule was. Minor cites it as authority for the *lex loci contractus*<sup>12</sup> while Wharton classes it as authority for the *lex solutionis* rule.<sup>13</sup> In most of the American jurisdictions, the cases are firmly in support of one or the other of these two solutions.<sup>14</sup> In New York, however, there appears to be a hopeless confusion existing. In *Bank v. Chapman*<sup>15</sup> the *lex loci contractus* was adopted without reference to the earlier case of *Thompson v. Ketcham*<sup>16</sup> which had flatly adopted the *lex solutionis*. Still later in *Hammerstein v. Sylva*,<sup>17</sup> the Supreme Court of New York upheld a

<sup>11</sup>125 Mass. 374 (1878).

<sup>12</sup>Conflict of Laws, Sect. 72.

<sup>13</sup>Conflict of Laws, 222.

<sup>14</sup>*Lex loci contractus*: Campbell v. Crampton, 2 Fed. 417 (1880); Hager v. Bank, 105 Ga. 116, 31 S. E. 141 (1898); Lawler v. Lawler, 107 Ark. 70, 153 S. W. 1113 (1913); Burr v. Beckler, 264 Ill. 230, 106 N. E. 206 (1914); Trust Co. v. Knabe, 122 Md. 584, 39 Atl. 1106 (1914). *Lex solutionis*: Thompson v. Ketcham, 4 Johns. 285 (N. Y. 1809); Robinson v. Queen, 87 Tenn. 445, 11 S. W. 38 (1889); Baum v. Birchall, 150 Pa. 164, 24 Atl. 620 (1892); Thompson v. Taylor, 66 N. J. L. 253; 49 Atl. 544 (1901).

<sup>15</sup>169 N. Y. 538, 62 N. E. 672 (1902).

<sup>16</sup>4 Johns. 285 (N. Y. 1809).

<sup>17</sup>66 Misc. 550, 124 N. Y. S. 535 (1910).

contract against a married woman incapacitated by the *lex loci contractus* but having capacity by the *lex domicilli* and the *lex solutionis*. It was in an exactly parallel situation in England that the English courts in desperation gave up any attempt at reconciling the conflicting authorities and adopted the intention of the parties' rule. It may be possible that the New York confusion will be similarly solved.

That such a solution will probably be the ultimate result in the United States is rather forcefully illustrated in the most recent judicial expression on the subject.<sup>18</sup> In this case the court was called upon to determine the liability on a note made in Tennessee by a married woman domiciled there and lacking capacity, and payable in Virginia where she had capacity to make the note. After a careful examination of nearly all the American authorities and a close argument on principle, the court upheld the validity of the note, adopting the rule that the law contemplated by the parties was the proper law to determine all questions relative to the contract, other than formalities, and that in the absence of express indication of the parties' intention, the law will presume that the law of the place of performance was intended. This conclusion, it should be noted, is somewhat different from the present English understanding of the intention test, namely that one should attempt to find the place with which the contract has the most real connection and then presume that the law of this place was the law contemplated by the parties.<sup>4</sup> It may be expected that under different facts this same court would weaken this presumption and probably adopt the "most real connection test." In *Poole v. Perkins*<sup>18</sup> the law of the place of performance sustained the contract and this fact was probably an important factor in causing the court to state its conclusion in the way it did. While in general the cases do not recognize this factor as important, it may be observed by studying a series of cases in any one jurisdiction that it is in fact always an element of highest importance.<sup>19</sup>

G. B.

**RIGHT OF A SURETY TO AVOID CONTRACT BECAUSE OF DURESS ON THE PRINCIPAL.**—The right of a surety to avoid his contract because of duress practiced on the principal is a much debated question. The cases and the authorities are in decided conflict upon this point. Although the conflict is well established, there is much as yet unsaid which may help toward arriving at a more satisfactory understanding of the problem.

When a surety pleads that his principal entered into the main obligation under duress, a simple legal problem arises: is that a sufficient plea for the surety? The answer has been given both

<sup>18</sup>*Poole v. Perkins*, 101 S. E. 240 (Va. 1919).

<sup>19</sup>*Bell v. Packard*, 69 Me. 105 (1879); *Liverpool etc. Co. v. Phenix Ins. Co.*, 129 U. S. 397 (1889); *South African Breweries Co. v. King*, *supra*.